UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 34

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC

and Case 34-CA-013051

ADAM CUMMINGS, AN INDIVIDUAL

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC

and Case 34-CA-065800

SHANNON SMITH, AN INDIVIDUAL JANUARY 18, 2013

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

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TABLE OF CONTENTS

l.	STA	TEMENT OF THE CASE	Page 1	
II.	ISSUES PRESENTED			
III.	FACTUAL OVERVIEW			
	A.	History of Collective Bargaining	5	
	B.	Requiring Vehicle Fluid Level Inspections	6	
	C.	Ensuring Use Of "Vehicle Inspection" Sheets	9	
	D.	Adam Cummings	10	
IV.	APPLICABLE LEGAL STANDARDS			
	A.	Section 8(a)(1) And (3) Of The Act	13	
	B.	Section 8(a)(5) of the Act	14	
	C.	Review Of ALJ's Credibility Determinations	15	
V.	ARGUMENTS			
	A.	The ALJ Erroneously Denied Respondent's Request for Pre- Arbitral Deferral with Regard to The Cummings' Complaint	16	
	B.	The ALJ Erroneously Concluded Respondent Violated Section 8(a)(1) And (3) Of The Act In Terminating Cummings	19	
	C.	The ALJ Erroneously Concluded That Respondent Violated Section 8(a)(1) And (5) Of The Act By Unilaterally Changing Its Policies And Issuing The Relevant Disciplines	24	
	D.	The ALJ Erroneously Concluded That The Board, As Currently Constituted, Has Authority To Act In This Matter	26	
	E.	The Portion Of The ALJ's Recommended Remedy Requiring Reinstatement Ignores The Record Evidence Of Cummings Violence Towards Respondent	27	
VI.	CON	CLUSION	28	

TABLE OF AUTHORITIES

CASES	Page
Abbey's Transportation Services v. NLRB, 837 F.2d 575 (2nd Cir. 1988)	15
ARA Leisure Servs., Inc. v. NLRB, 782 F.2d 456 (4th Cir. 1986)	14
Collyer Insulated Wire, 192 NLRB 837 (1971)	16-18
Columbian Distribution Servs., 320 NLRB 1068 (1996)	14
Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004)	27
Farmer Bros. Co., 303 NLRB 638 (1991), enf'd, F.2d 120 (9th Cir. 1993)	14
Flambeau Airmold Corp., 334 NLRB 165 (2001)	14
Hammontree v. N.L.R.B., 925 F.2d 1486 (D.C. Cir. 1991)	16
In re Warehouse Union Local 6, 336 NLRB No. 10 (Nov. 19, 2001)	19
Iron Griddle Restaurant, 325 NLRB 1197 (1998)	15
Local 888, American Federation Of Government Employees (Bayley-Seton Hospital), 308 NLRB 646 (1992)	19
Manville Forest Products, 269 NLRB 390 (1984)	23
N.L.R.B. v. Transportation Mgmt. Corp., 462 U.S. 393 (1983)	14
N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822 (1984)	22-23
N.L.R.B. v. Pyne Molding Corp., 226 F.2d 818 (2nd Cir. 1955)	15
Nat'l Ass'n of Letter Carriers Merged Branch No. 19, 359 NLRB 1 (2012)	14
Nat'l Radio Co., 198 N.L.R.B. 527 (1972)	17
New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010)	26
Sherwood Diversified Svcs., 278 NLRB 472 (1986)	15
Specialty Restaurants Corp., 232 NLRB 248 (1977)	15

Standard Dry Wall Prods., 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951)	15-16				
Stop & Shop, Inc., 161 NLRB 75, aff'd. 377 F.2d 59 (1st Cir. 1967)	23				
Teamsters Local 379 and Brockway-Smith Company, American Arbitration Association Case No. 11 300 02501 01 dated May 10, 2002					
United Technologies Corp., 268 NLRB 557 (1984)					
Utica Observer-Dispatch v. N.L.R.B., 229 F.2d 575 (2nd Cir. 1956)					
Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)	13-14 24				
STATUTES					
29 U.S.C. § 151 et seq.	1				
U.S. Const. art. II., § 2, Cl. 2	27				
U.S. Const. art. II., § 2, Cl. 3	27				
PUBLICATIONS					
General Counsel's Memorandum, "Arbitration Deferral Policy under Collyer-Revised Guidelines" (May 10, 1973)	17				
N.L.R.B. Office of General Counsel, Division of Operations-Management Memorandum 05-77 (June 20, 2005)	17				
NLRB Casehandling Manual Sec. 102.31	26				

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BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE

On or about July 20, 2011, Adam Cummings, an individual, filed a charge in Case No. 34-CA-013051 alleging that Respondent, American Medical Response of Connecticut, Inc. ("Respondent") discharged him in violation of Section 8(a)(3) of the National Labor Relations Act ("Act"), as amended, 29 U.S.C. § 151 et seq. (GC Exh. 1.)¹ Thereafter, Cummings filed two amended charges. Cummings' first amended charge added allegations that Respondent violated Section 8(a)(5) of the Act by unilaterally changing working conditions and issuing disciplines based on said change. (Id.) His second amended charged added allegations that Respondent violation Section 8(a)(1) of the Act by terminating Cummings in retaliation for engaging in concerted

activities and that Respondent violated Section 8(a)(3) of the Act by allegedly terminating Cummings due to the actions of a NEMSA business agent. (Id.)

On or about December 30, 2011, Region 34 of the National Labor Relations Board ("Board") issued a Consolidated² Complaint and Notice of Hearing alleging violations of Section 8(a)(1), (3) and (5) of the Act. (GC Exh. 1.) Respondent timely filed an answer to the complaint. (GC Exh. 1.)

Prior to the start of the relevant hearing before Administrative Law Judge Raymond P. Green (the "ALJ"), Respondent made an oral motion to defer Case 34-CA-013051 ("the Cummings Complaint") to the parties' contractual grievance/arbitration process, which the ALJ denied. (R. Exh. 1.) Thereafter, on May 3, 2012, Respondent sought special permission to appeal said denial and asked that the Board stay its consideration of the Cummings Complaint and require the parties to continue pursuing their contractually agreed upon arbitration process. (Id.) Said request was denied. (ALJD p. 2, n.2.)

A hearing was held on the matter on May 3-4, 2012. The matter was continued and further testimony was heard, on May 23-25, 2012, and July 24-25, 2012. Prior to July hearing dates, on July 2, 2012, Respondent filed a Motion to Dismiss the charges contained in Paragraph 31 of the Consolidated Amended Complaint. (R. Exh. 30A.) On July 13, 2012, Counsel for the General Counsel ("CGC") objected to said Motion and on

by the appropriate page number preceded by "ALJD."

¹ References to the official transcript are designated by their appropriate page number preceded by "Tr." References to Counsel for the General Counsel's (hereinafter "General Counsel") exhibits and Respondent's exhibits are designated by the appropriate number preceded by "GC Exh." and "R Exh.," respectively. References to the decision of Administrative Law Judge Raymond P. Green are designated

² Shannon Smith, an Individual, filed the charge in Case No. 34-CA-065800 asserted violations of Section 8(a)(1), (3) and (5) of the Act against Respondent . The ALJ properly concluded that Respondent did not violate the Act with regard to Smith. (ALJD. p. 13.) Respondent does not except the ALJ's conclusions as to the Smith.

July 16, 2012 the ALJ denied the Motion to Dismiss without prejudice. (R. Exh. 30B-C.) The case concluded on July 25, 2012. The ALJ issued his decision on November 20, 2012, concluding that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its policies regarding the checking of oil and coolants and the requirement that employees fill out daily checklists, Section 8(a)(1) of the Act by issuing disciplinary warnings to employees for allegedly not checking oil and coolants and filling out daily checklists and Section 8(a)(1) and (3) of the Act by discharging Cummings because of his union and protected concerted activities. (ALJD p.13.)

II. ISSUES PRESENTED

- A. Whether the ALJ erroneously denied Respondent's Motion to Defer. (Exceptions 1, 26, 28.)
- B. Whether the ALJ erroneously concluded Respondent unilaterally changed its policies regarding the checking of oil and coolants and the requirement that employees fill out daily checklists in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (Exceptions 2-13, 22-23, 26, 28.)
- C. Whether the ALJ erroneously concluded Respondent unlawfully issued disciplinary warnings to employees for not completing and turning in daily checklists in violation of Sections 8(a)(1) of the Act. (Exceptions 2-13, 22-23, 26, 28.)
- D. Whether the ALJ erroneously concluded Respondent unlawfully discharged Cummings for his union and protected concerted activities in violation of Sections 8(a)(1) and 8(a)(3) of the Act. (Exceptions 14-21, 24, 26, 28.)
- E. Whether the ALJ erroneously and improperly concluded that the Board, as currently constituted, has authority to act in this case. (Exception 25-26, 28.)

F. Whether the ALJ erroneously and improperly ordered the Company be required to reinstate Cummings. (Exceptions 26-28.)

III. FACTUAL OVERVIEW

Respondent terminated Cummings for engaging in unprotected conduct. Cummings wrote in an email to Respondent's management that he would "be advising the employees to have a mechanic check the trucks..." (GC Exh. 4, 16, 44, 63; R. Exh. 24, Tr. 1036-39, 1046-48.) Then, when asked specifically on numerous occasions whether said threat was an attempt to incite a concerted job action, Cummings did not deny his intentions. (Id.) Shortly after Cummings' email, Respondent conducted an audit to ascertain the compliance rate of employees completing vehicle checklists and found that nearly fifty percent did not turn in the checklist. (GC Exh. 14, 48, 50-51, 57-58; Tr. 1046-48.) Given Cummings threat, refusal to deny the same and the temporal proximity of employees not completing the required checklists, Respondent reasonably determined that Cummings incited a work action in violation of the relevant collective bargaining agreement and terminated his employment. (Id.)

Respondent properly followed the relevant collective bargaining agreement in adopting and enforcing the relevant Standard Operating Procedures ("SOPs"). (Tr. 429, 431, 1027-30, 1035; GC Exh. 4; R Exh. 2, 27.) In concluding otherwise, the ALJ ignores the sworn testimony of CGC's own witnesses that the SOPs were agreed to by NEMSA, concluding that some physical evidence of the same is required. (ALJD p. 6.) Having properly adopted the SOPs, Respondent appropriately issued disciplinary warnings to employees who did not comply with the SOP at issue in this case. (Tr. 429, 431, 1027-30, 1035; GC Exh. 4, 57-58; R Exh. 2, 27.)

A. History of Collective Bargaining

All events relevant to this Complaint relate to Respondent's division covering the Greater Hartford, Connecticut area. (Tr. p. 1010.) At all relevant times, Respondent employed paramedics and EMTs ("emergency personnel"). (Tr. p. 253, 813.) In 1996, Respondent's emergency personnel of its predecessor company were organized by Greater Hartford Emergency Medical Technicians Associate ("GHEMTA"). (Tr. p. 118, 1002.) Thereafter, in or around 2002, these same employees voted to accept New England Health Care Employees Union, District 1199/SEIU ("1199") as their exclusive bargaining representative. (Tr. p. 119, 1011.) In July 2008, the Respondent's emergency personnel voted to accept the National Emergency Medical Services Association ("NEMSA") as their exclusive bargaining representative. (Tr. p. 130, 313-14.) In April 2009, Respondent and NEMSA ratified the NEMSA collective bargaining agreement ("NEMSA CBA"). (Tr. at 1027; GC Exh. 4.) In April 2011, NEMSA's Stewards included: Adam Cummings, Bree Eichler, Ben Orioli and Mike Kerr. (Tr. p. 1039; R Exh. 24.)

The NEMSA CBA included provisions prohibiting work actions during the term of the contract. (GC Exh. 4.) Specifically, Section 17.01 entitled "No Strike/Work Action" provided in relevant part:

...during the term of this Agreement, neither the Union nor its agents or any of its members will collectively, concertedly, or in any manner whatsoever, engage in, incite or participate in any picketing, strike, sit-down, stay-in, slowdown, boycott, work stoppage...at any Employer location within the bargaining unit covered by this Agreement...Employees who violate this Article shall be discharged from employment...

(GC Exh. 4 at 45, emphasis added.)

B. Requiring Vehicle Fluid Level Inspections

Since at least 1990 Respondent has provided hands-on training to its emergency personnel regarding vehicle maintenance and inspection as part of its new hire training courses. (Tr. p. 856-857, 907-910, 965; R Exh. 29.) During these courses, Respondent mechanics demonstrate many aspects of vehicle maintenance including how to check the oil level of the emergency vehicles. (Id.) In addition, prior to April 2011, Respondent had a "Pre-Trip Inspection" sheet for employees to complete at the beginning of every shift. (GC Exh. 53.) Many employees routinely checked their vehicle's oil level prior to the start of their shift or at the end of their shift and completed Respondent's "Pre-Trip Inspection" sheet. (Tr. p. 213, 535-536, 555, 633, 644, 857.) As one of GCG's witnesses, paramedic Catherina Citta³, explained, checking vehicle oil levels "always [] existed in some policy of some form [and] the expectation was that the employees [take] it upon themselves to make sure that the vehicle was road worthy." (Tr. 213; see also Tr. 639.) This was something confirmed by all of CGC's witnesses.⁴

Section 14.01 of the NEMSA CBA provides:

Within ninety (90) days following the execution of this Agreement, the Employer shall provide the Union with copies of all operational policies, procedures and work rules proposed to apply to bargaining unit employees during the term of this Agreement. Within thirty (30) days following receipt of the proposed operational policies, procedures and work rules, the Union shall have the right to bargain with the Employer. Following the bargaining process, the Employer may apply these operational policies, procedures and work rules to bargaining unit employees for the term of this Agreement....

³ At times during her employment with Respondent, Citta was known by the name Catherina Below. (See, e.g., Tr. p. 1025.)

⁴ For example, Ray Tierney, a full time paramedic with Respondent and GCG witness, explained that "it was pretty much second nature to me that you should check the oil." (Tr. p. 555.) Kimberly Quinn, another paramedic with Respondent and GCG witness who was uncomfortable checking the vehicle oil level herself, explained that prior to April 2011 she took her vehicle to a mechanic within Respondent's facility every Monday and asked the mechanic to check the vehicle's oil level. (Tr. p. 644.)

(GC Exh. 4.) Ninety (90) days after the ratification of the NEMSA CBA, Respondent provided NEMSA with its existing SOPs as required by Section 14.01. (Tr. p. 429, 431, 1027; GC Exh. 4, 19, 21-22; R Exh. 2.) In the fall of 2009 and into the spring of 2010, NEMSA and Respondent met and conferred on several occasions to discuss the SOPs. (Tr. p. 1027-30; GC Exh. 18-19, 22.) In February 2010, Sean Piendel, Respondent's former General Manager, emailed NEMSA a final draft of the SOPs. (Tr. p. 1010, 1029-1035; GC Exh. 18-19, 22; R Exh. 27.) Thereafter, Respondent received a verbal authorization from NEMSA to finalize the SOPs and Respondent distributed the final SOPs in March 2010 to emergency personnel. (Tr. p. 882-883; 1057-1059; GC Exh. 22; R Exh. 27.)

Despite all the testimony and evidence to the contrary, the ALJ mistakenly concluded that the SOPs were never actually agreed upon by NEMSA. (See e.g. ALJD p. 6-7.) However, even the testimony of CGC's own witnesses conclusively demonstrates that the SOPs were agreed upon and properly in effect. Shannon Smith testified that once the NEMSA contract was ratified, the SOPs could be bargained over and, regardless of agreement between the parties, be put into effect. (Tr. p. 156-57.) Smith also testified that Respondent had a written policy since 2004 regarding the completion of vehicle checklists including oil fluid checks. (Id. at 162-63.) Citta also testified to knowing and being familiar with the SOPs. (Tr. at 289.) Another witness, Chris Dennis, testified that Respondent had a policy in effect that required vehicle checklists and oil checks. (Tr. at 639.) Moreover, NEMSA's then Chief Steward, Bree Eichler testified that the SOPs, including a checklist requirement, were in effect and legitimate. (Tr. at 780-82.) Given these witnesses undisputed testimony about the

SOPs, it is incomprehensible that the ALJ could conclude that the SOPs were not agreed to by the parties after the ratification of the NEMSA CBA. (ALJD p. 6.)⁵

SOP 2.22, entitled "Start of Shift Procedures", requires all relevant employees to:

Report to the vehicle and complete a "Vehicle Inspection" sheet and include it in the daily paperwork. Ensure that the vehicle is ready to respond by checking the oil level and starting the vehicle. Any vehicle failures shall be promptly reported to the Operations Supervisor.

(R Exh. 2 at p. 15.)

Much of the communication between Respondent's management, supervisors and nonsupervisory personnel occurred via email. (See, e.g. GC Exh. 16, 17, 22-40.) Around the spring of 2011, Duane Drouin, a former Respondent Field Operations Supervisor ("FOS"), undertook revising the existing "Pre-Trip Inspection" sheet to make it more user friendly and easier to complete. (Tr. p. 635, 811, 814-815; GC Exh. 24.) On April 1, 2011, Drouin emailed a draft "Vehicle Inspection" sheet to the FOSs and Field Training Officers ("FTOs") for feedback. FTOs are not supervisors, but are non-supervisory NEMSA bargaining unit members. (Tr. p. 274-75, 815-818; R Exh. 10.) The ALJ entirely ignores the fact that Drouin sent the revised checklist to FTOs which are non-supervisory, NEMSA bargaining unit members. (ALJD p. 5.) This fact is significant and demonstrates that throughout the revision process, the bargaining unit

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⁵ The ALJ also erred in giving no weight or deference to the legal opinion of NEMSA's own labor attorneys that was communicated to the bargaining unit members at the relevant time. (ALJD p.7-8.) During the timeframe of the April 2011 emails, NEMSA Labor Representative Toby Sparks communicated to Cummings, and the other bargaining unit members and Stewards who received Cummings' April 2011 emails that he disagreed with Cummings' position regarding the requirement that emergency personnel complete "Vehicle Inspection" sheets. (See, e.g. GC Exhs. 19, 24, 25.) Sparks also informed the NEMSA stewards, including Cummings, that his information was based on a legal opinion from NEMSA's labor attorneys. (GC Exh. 21.) Sparks explained that Respondent could enforce a previously agreed upon work rule and that the vehicle oil level checks were part of the SOPs. (Id.) He also cautioned Cummings and the other Stewards against challenging Piendel and other high level managers on this

had notice that Respondent was updating the relevant checklist. (Tr. p. 207-208, 818-819; R Exh. 13; GC Exh. 6.) Moreover, the ALJ incorrectly states that Drouin emailed a new form. (ALJD p. 5.) In fact, Drouin simply revised the prior existing "Pre-Trip Inspection" sheet. (Tr. p. 207-208, 289, 814-22, 824-26; R Exh. 13; GC Exh. 6, 24, 53.)

On April 6, 2011 Drouin finalized the "Vehicle Inspection" sheet and emailed it to the FOSs and FTOs instructing them to begin using the revised form immediately. (Tr. p. 207-208, 289, 818-819; R Exh. 13; GC Exh. 6, 24.) Again, the ALJ ignores that Drouin emailed the final version to some bargaining unit members. (ALJD p. 5.)

The ALJ also fails to acknowledge that Respondent specifically informed NEMSA of the requirement that emergency personnel complete the revised "Vehicle Inspection" form. (ALJD p. 5.) Specifically, it is undisputed that Kelly Gauthier, Respondent's former Human Resources Generalist, emailed a copy of an April 8th memorandum concerning the revised checklist and the need to complete same to NEMSA Labor Representative Toby Sparks, who was assigned to represent the bargaining unit at that time. (Tr. p. 820-821; R Exh. 14.)

C. Ensuring Use Of "Vehicle Inspection" Sheets

Respondent conducted its first audit to ensure that emergency personnel were completing "Vehicle Inspection" sheets in early May 2011. (Tr. p. 828; R Exh. 16(a)-(f).) Respondent issued approximately 115 verbal warnings to emergency personnel based who worked and did not complete and submit a "Vehicle Inspection" sheets for the week ending May 8, 2011. (See e.g., Tr. p. 829-831, 843-844, 891-892; R Exh. 17, GC Exh. 57.) Given the surprisingly low compliance rate, Drouin conducted a second audit for

requirement. (Id., see also GC Exh. 38.) That NEMSA's own labor attorneys understood that the SOPs were properly adopted flies in the face of the ALJ's conclusion to the contrary.

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the week ending May 29, 2011. (Tr. p. 853; R Exh. 18(a)-(h).) As a result of this audit, Drouin found about fifty (50) emergency personnel non-compliant and Drouin issued a verbal or written warning to those employees, as appropriate. (Tr. p. 854; R Exh. 18.)

D. Adam Cummings

On or about October 2004, Respondent hired Adam Cummings as a full time EMT. (Tr. p. 307.) During his employment, the emergency personnel elected Cummings as a NEMSA Union Steward and he was familiar with the provisions of the NEMSA CBA. (Tr. 309-310.)

On April 8, 2011, Cummings emailed Piendel, using their typical method of communication⁶, and expressed concern with Respondent's decision to require emergency personnel to complete the "Vehicle Inspection" sheets and check oil levels as part of this procedure. (GC Exh. 16.) Cummings sent this email to other NEMSA Stewards, Sparks and, Chris Dennis, a NEMSA bargaining unit member. (GC Exh. 16.) The ALJ erroneously states that Cummings' April 2011 emails were only to Respondent's management and union stewards. (ALJD p. 7.) However, it is undisputed that Dennis was **not** a NEMSA Steward at the time of Cummings' April 2011 email. (R Exh. 24; Tr. 1036-39.)⁷ This fact is significant because by including Dennis

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⁶ The ALJ's suggestion that Cummings' failure to simply deny that he was inciting a concerted work action was merely a "large misunderstanding" because of the parties' method of communication demonstrates his illogical view of the evidence. (ALJD p. 10, n.7.) First, given the twenty-four hour operations of Respondent's business, email was the most common and effective method of communication for the parties. (See, e.g. GC Exh. 16, 17, 22-40.) Second, Piendel could not have been more straight-forward when communicating to Cummings the need for a "yes or no" response to his prior question as to whether Cummings was "initiating a concerted job action against AMR." (Tr. p. 1036, 1038; GC Exh. 16, 63.) Finally, Respondent did meet fact to face with Cummings on June 1 and Cummings still refused to give a direct answer to Respondent's question. (Tr. p. 1046-1048; GC Exhs. 33, 63.)

⁷ In April 2011, the Respondent NEMSA Stewards were: Cummings, Eichler, Orioli and Kerr. (Tr. p. 1039; R Exh. 24.)

on the email Respondent knew that Cummings' was communicating his intentions directly to at least one bargaining unit member.

In his initial email, Cummings questioned the safety of the oil check requirement. (GC Exh. 16.) Within an hour's time, Piendel responded to Cummings' email and explained that the SOPs had always included the requirement that emergency personnel check vehicle oil levels and suggested that if "an employee claim[ed] that they are unaware of how to complete these checks" they should "have a fleet maintenance employee demonstrate." (Id.)

Cummings, other NEMSA Stewards, and Dennis continued emailing Piendel and other members of Respondent's management regarding their belief that emergency personnel needed training on checking vehicle oil levels prior to being disciplined for not doing the oil checks. (Id.) In an April 11, 2011 email to Piendel, on which he also copied Dennis, Cummings wrote:

You need to provide and everyone with training with the propper[sic] training before asking anyone to do these tasks. Until then I will be advising the employees to have a mechanic check the trucks to protect the equipment and employees.

(GC Exh. 16, emphasis added.) Within thirty (30) minutes, Piendel responded, via email:

Am I to understand that you are initiating a concerted job action against AMR? Please respond and based on your response, I will take the necessary action immediately!

(Tr. p. 1036, 1038; GC Exh. 16, emphasis added.) In response, Cummings stated, via email:

"Have at it if you feel that is [what] my response entailed..."

(Id., emphasis added) Shortly thereafter, Piendel emailed Cummings asking for a clear "yes/no" response. (Id., emphasis added) Cummings stated, via email,

"I feel that I have made my concerns and intentions quite clear...Do with that knowledge as you will..."

(GC Exh. 16, emphasis added.)

As explained above, on or about May 9, 2011, Respondent issued approximately 115 disciplinary warnings to emergency personnel for not completing the Vehicle Inspection" sheet. (See, e.g., GC Exhs. 14, 48, 50, 51, 57.) Based on the high incidence of noncompliance coupled with Cummings' statement in his April 11th email, Piendel communicated to Cummings, Eichler and Sparks Respondent's conclusion that Cummings violated the NEMSA CBA by inciting a work action. (GC Exh. 22, 38.) Concerned that Cummings incited a work action in violation of the NEMSA CBA, Sparks wrote Respondent a letter disavowing any such action by Cummings. (R. Exh. 20.)

On or about June 1, 2011, Respondent offered Cummings another opportunity to address Respondent's belief that he had incited a work action at held a meeting with Piendel, Zagami and Gauthier, with Eichler also in attendance as his union representative. (Tr. p. 1046-1048; GC Exhs. 33, 63.) During this meeting, Cummings did not state that he did not incite a work stoppage. (GC Exh. 63.) The ALJ erroneously concludes that during the June 1st meeting Cummings denied having instigated a work stoppage. (ALJD p. 9.) However, Cummings' own surreptitious recording of the June 1st meeting reveals that Cummings simply continued to avoid a direct response to Respondent's question as to whether or not he incited a work action. When pressed by Respondent to "elaborate and ... tell his side of the story," Cummings stated that he did not do anything to violate Article 17.02 as he read it. (GC Exh. 63.)

Specifically, Cummings stated that he "didn't do anything that prevented anybody from doing a call, doing their run forms or anything of that nature." (Id.) Contrary to the ALJ's conclusion, Cummings' statements that he did not "prevent" his coworkers from engaging in these activities is not tantamount to Cummings "repl[ing] .. that he did not instigate a work stoppage." (ALJD p. 9.) After the June 1st meeting, Respondent placed Cummings on administrative leave. (Tr. p. 1048; GC Exh. 40.)

Just weeks after Cummings' threat some fifty percent of the emergency personnel did not turn in a completed "Vehicle Inspection" sheet. (See Tr. p. 889, 1066, 1094-1095; GC Exhs. 38, 44, 63.) By letter dated June 3, 2011, Respondent terminated Cummings employment for his violation of Section 17.01 of the NMSA CBA. (Tr. p. 1062; GC Exh. 44.)

Subsequent to his termination, Cummings posted a comment on a Facebook page of a Respondent emergency personnel stating, "Until AMR gets rid of the management team up to and including Zagombi nothing will change. Only crews and patients will suffer." (GC Exh. 49.) Next to this statement was a picture of Cummings holding and aiming a semi-automatic weapon. (R. Exh. 7.)

IV. APPLICABLE LEGAL STANDARDS

A. Section 8(a)(1) And (3) Of The Act.

Wright Line, 251 NLRB 1083, 1089 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), provides an analytical framework to determine an employer's motivation with respect to Section 8(a)(3) allegations. Specifically, in order to establish a prima facie violation of Section 8(a)(3), "General Counsel must establish (1) that the alleged discriminatees engaged in union activities; (2) that the employer had

knowledge of such; (3) that the employer's actions were motivate by union animus; and (4) that the discharge had the effect of encouraging or discouraging membership in a labor organization." *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), *enf'd*, 988 F.2d 120 (9th Cir. 1993). Because any discriminatory conduct motivated by union animus violates Section 8(a)(3), the employer's motivation is a pre-condition to finding a violation. Therefore, the *prima facie* case requires the General Counsel prove the employer had a discriminatory intent that was a substantial or motivating factor in the employment action. *NLRB Transportation Mgmt. Corp.*, 462 U.S. 393, 400 (1983).

If General Counsel establishes a *prima facie* case, the burden then shifts to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. "Thus, an employer might show that a worker's deficiencies, economic necessity, or legitimate business policy compelled [the employment action]." *ARA Leisure Servs., Inc. v. NLRB*, 782 F.2d 456, 462 (4th Cir. 1986). "Absent animus, the *prima facie* case falls and the General Counsel has failed to sustain his burden of proof on the 8(a)(3) allegation." *Columbian Distribution Servs.*, 320 NLRB 1068, 1071 (1996).

B. Section 8(a)(5) of the Act

"Pursuant to Section 8(a)(5), each party to a bargaining relationship is required to bargain in good faith." *National Ass'n of Letter Carriers Merged Branch No. 19*, 359 NLRB 1 (2012). As such, as a general rule, employers are prohibited from making changes related to wages, hours or terms and conditions of employment without affording the certified representative an opportunity to bargain. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). Section 8(d) imposes the mutual obligation on employers

and unions to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."

C. Review Of ALJ's Credibility Determinations.

The Board's policy is not to overrule an administrative law judge's resolutions of credibility unless the clear preponderance of all the relevant evidence convinces it that the resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enf., 188 F.2d 362 (3rd Cir. 1951). However, while the Board will give weight to the ALJ's findings, "especially where they rest on credibility and the demeanor of witnesses, . . . it may certainly overrule him, even where credibility is involved, if his findings conflict with strong inferences from evidence which he credited." Utica Observer-Dispatch v. NLRB, 229 F.2d 575 (2nd Cir. 1956), citing NLRB v. Pyne Molding Corp., 226 F.2d 818 (2nd Cir. 1955). Furthermore, the Board need not "give special deference to the inferences drawn by an Administrative Law Judge" and is free to choose contrary inferences from the evidence. Abbey's Transportation Services v. NLRB, 837 F.2d 575 (2nd Cir. 1988). Also, the Board will not adopt the ALJ's decision where he has failed to consider relevant evidence, to make appropriate findings of fact, to resolve outstanding conflicts in testimony, and he has made incorrect credibility resolutions. Specialty Restaurants Corp., 232 NLRB 248 (1977); Iron Griddle Restaurant, 325 NLRB 1197 (1998); Sherwood Diversified Svcs., 278 NLRB 472 (1986).

In this case there are several instances, as will be discussed further in this supporting brief, where the ALJ has made incorrect factual findings adverse to the position advanced by Respondent, and has rejected the credible evidence submitted by both Respondent and CGC during the hearing. Although some of the ALJ's findings

may entail credibility determinations, many of the ALJ's findings represent an erroneous rejection of undisputed factual evidence or the failure to take into account certain relevant and undisputed facts presented in the record. Based on these errors and omissions, the ALJ has drawn improper factual and legal conclusions which he ultimately relies on in deciding that Respondent committed the unfair labor practice as alleged in the complaint with regard to Cummings' termination and the issuing of the relevant disciplines.

V. ARGUMENTS

A. The ALJ Erroneously Denied Respondent's Request for Pre-Arbitral Deferral with Regard to The Cummings' Complaint

The ALJ erroneously denied Respondent's Motion to Defer. (ALJD pg. 2, n. 2.)

A pre-arbitral deferral was warranted here, where all of the *Collyer* elements are met.

As the Board notes in its pattern for a *Collyer* deferral letter:

The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

N.L.R.B. Case Handling Manual 10118.6 Pattern for Collyer Deferral Letter. In this way, pre-arbitral deferrals "resemble[] the exhaustion requirements often found in administrative regimes and the abstention doctrines employed by federal courts." Hammontree v. N.L.R.B., 925 F.2d 1486, 1490 (D.C. Cir. 1991). That is, deferral is the "exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." *United Technologies Corp.*, 268 N.L.R.B. 557, 560 (1984). "The Board's doctrine of pre-arbitral deferral is

principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes." General Counsel Memorandum 12-01.

In Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), the Board considered a § 8(a)(5) claim arising out of an alleged unilateral change of working conditions by an The Board held that, where certain conditions are met, it would require exhaustion of arbitration remedies within the relevant CBA before it considered the complaint. Id. Since then, the Board has found pre-arbitral deferral appropriate in § 8(a)(1), (a)(3) and 8(a)(5) cases where: (i) there is a long-standing bargaining relationship between the parties; (ii) there is no claim that the employer generally opposes the employees' exercise of protected rights; (iii) the employer manifests a willingness to arbitrate; (iv) the CBA's arbitration clause covers the dispute at issue; and (v) the contract and its meaning lie at the center of the dispute. See 192 N.L.R.B. at 842; see also National Radio Co., 198 N.L.R.B. 527 (1972); United Technologies Corp., 268 N.L.R.B. 557 (1984); 1973 General Counsel Memorandum, "Arbitration Deferral Policy under Collyer-Revised Guidelines" (May 10, 1973); Operations-Management Memo 05-77 (June 20, 2005). With regard to the Cummings Complaint, all Collyer elements were met and the ALJ should have deferred his consideration of the Cummings Complaint.

The first *Collyer* element, that the parties have a long-standing relationship, can not be in dispute here. That is, the relevant bargaining unit of EMTs and paramedics in the Cummings Complaint had a long-standing, productive bargaining relationship with AMR. In fact, the bargaining unit had been represented by a Union since at least 1994. Similarly, there is no claim in the Cummings Complaint that AMR generally opposes its

employees' exercise of protected rights. Moreover, given the long-standing relationship between AMR and the relevant bargaining unit, "[AMR] can hardly be characterized as displaying a deep-seated animus to its employees' union representation or disregard for its employees' statutory rights." *Appalachian Power Company*, 198 NLRB 576, 579 (1972).

As to the third *Collyer* element, AMR is willing to continue with arbitration of the Cummings Complaint. AMR expressly requested deferral in its Amended Answer to the Cummings Complaint through an Affirmative Defense. (GC Exh. 1.) Moreover, AMR informed Counsel for the General Counsel that it would waive any and all obstacles, including all timeliness defenses to the grievance, to arbitration. Moreover, the fourth element and fifth *Collyer* conditions are also present in the Cummings Complaint. The NEMSA CBA covers a broad range of grievances. Here, the Union had already invoked the arbitration process through the CBA's grievance procedures, the parties selected an arbitrator and were ready to start the arbitration hearing.

Finally, none of the factors weighing against a *Collyer* deferral are present here. That is, the Cummings Complaint does not involve any violations of § 8(a)(4), there are no allegations that AMR has failed to supply information in violation of §§ 8(a)(5) or 8(b)(3), AMR's defense is reasonably based on an interpretation of the Collective Bargaining Agreement and the Cummings Complaint does not involve the resolution of unit determination or other representation type issues.

The ALJ mistakenly states that because NEMSA was adverse to Cummings, arbitration is not appropriate. (ALJD pg. 2, n.2.) This conclusion, however, ignores the fact that the Board could require NEMSA to pay for an attorney of Cummings' choice to

represent him at arbitration. See e.g. In re Warehouse Union Local 6, 336 NLRB No. 10 (Nov. 19, 2001) (Union ordered to permit bargaining unit member to select attorney for any grievance proceeding, including arbitration or other resolution, and pay reasonable legal fees of that attorney.); Local 888, American Federation Of Government Employees (Bayley-Seton Hospital), 308 NLRB 646, 651 (1992) (union ordered to permit grievant to be represented at arbitration by their own counsel and to pay reasonable attorney's fees of such counsel where union no longer collective bargaining representative of employees in unit).

Ultimately, allowing the union to bring the Cummings Complaint before the Board instead of continuing with the arbitration proceedings it began would violate the Union's commitment to arbitrate contractual disputes. See 192 N.L.R.B. at 842. Accordingly, the ALJ should have deferred the Cummings Complaint.

B. The ALJ Erroneously Concluded Respondent Violated Section 8(a)(1) And (3) Of The Act In Terminating Cummings.

Respondent did not terminate Cummings for his union and protected concerted activities. Instead, the record evidence proves that Respondent terminated Cummings for inciting a work action, which conduct violated the NEMSA CBA and was not protected under the Act. Any finding to the contrary is not supported by the record and therefore should be reversed by the Board.

Respondent terminated Cummings for inciting a work action. The ALJ mistakenly concludes that the "only evidence that might arguably support" the fact that Cummings inciting a work stoppage was GC Exh. 16, the April 2011 emails. (ALJD p. 10.) The record reveals far more evidence existed. The emails the ALJ references, which were also sent to at least one bargaining unit member, proceed as follows:

[Cummings]	You need to	provide and	everyone with	the proper

training before asking anyone to do these tasks. Until then I will be advising the employees to have a mechanic check the trucks to protect the

equipment and employees.

[Piendel] Am I to understand that you are initiating a

concerted job action against AMR? Please respond and based on your response, I will take the

necessary action immediately

[Cummings] Have at it if you feel that is [sic] my response

entailed...

[Piendel] Not really an answer...it was a yes/no question.

[Cummings] I feel that I have made my concerns and intentions

quite clear...Do with that knowledge as you will...

(GC Exh. 16.) Alone, these emails provide sufficient good faith for Respondent to have believed that Cummings was indeed attempting to incite a work action. That is, when asked directly whether or not those were his intentions, Cummings did not deny the allegation. (GC Exh. 16.)

However, Respondent did not terminate Cummings just because of the email exchange. Respondent also offered Cummings a chance to address its concerns face to face and on June 1st again asked him his intentions and, again, Cummings did not deny the allegations during this meeting. (GC Exh. 63.) Moreover, just weeks after Cummings statement Respondent found some fifty percent of its emergency personnel did not complete and turn in the checklist. Finally, although not relied on by Respondent, NEMSA's disavowal letter regarding Cumming's conduct tended to confirm Respondent's independently reached conclusion that Cummings had incited a work action against Respondent. (R. Exh 20.) Cummings' repeated refusal to answer Respondent's direct questions (both in email and in person), the fact that a few weeks

later some fifty percent of the emergency personnel did not complete and turn in a "Vehicle Inspection" sheet and NEMSA's letter forced Respondent to conclude in good faith that Cummings had incited a work action in violation of the NEMSA CBA.

Moreover, the ALJ fails to mention in his findings that Respondent received numerous complaints regarding the "Vehicle Inspection" sheet requirement from other emergency personnel— yet Respondent did not terminate any of those employees. For example, Respondent did not terminate or discipline the following employees who complained, equally as vociferously as Cummings, about the "Vehicle Inspection" sheet requirement.

- Eichler, then NEMSA chief steward, who complained of "safety issue[s] of employees properly checking to ensure vehicle maintenance as well as that this is a company policy that has never been enforced." (GC Exh. 16.)
- Orioli, another NEMSA Steward, who complained that "he was never once trained" on how to check oil fluid levels" and stated to Piendel, "If it's that important that you want to slam this all on us without warning then it should be just as important that it is carried out correctly." (GC Exh. 16.)
- Dennis who complained that there wasn't a specific "Vehicle Inspection" sheet "for the fly cars...[n]ot to mention that in some of the vehicles you can't see the reservoirs for some of the fluids to check them." (Tr. p. 602; GC Exh. 16.)

Moreover, numerous employees wrote comments on the verbal and written warnings they received for not completing a "Vehicle Inspection" sheet; Respondent did not terminate *any* of those employees. (See e.g. GC Exh. 14.)⁸

⁸ The ALJ's reliance on Smith's testimony regarding Cummings' termination belies credulity. Specifically, the ALJ finds that Smith credibly testified that when asked "if it was true that [Drouin] got Cummings fired[Drouin replied], "Well it takes a little bit more to set the smart ones up." (ALJD p. 10.) No other record evidence supports this well rehearsed testimony. There is no evidence that Drouin had any authority regarding hiring and firing employees or was involved in any in the decision to terminate Cummings. Moreover, Drouin himself denied making such a statement to Smith. (Tr. at 857.)

Contrary to the ALJ's conclusion, Cummings was not merely attempting to enforce the provision of an existing collective bargaining agreement as the ALJ concluded. (ALJD p. 10.) In fact, the evidence clearly demonstrates that, under the SOPs, Respondent permissibly required "Vehicle Inspection" sheet at issue in Cummings' emails. Even Eichler, then chief steward, testified to the legitimacy of the SOPs.

[Respondent's Attorney]: My question is, back to standard operating

procedures, does it mention checking the oil and

the fluids?

[Eichler]: Yes.

[Respondent's Attorney]: And are the standard operating procedures

legitimate? Yes or no?

[Eichler]: Yes

(Tr. at 782.) Moreover, Cummings exceeded the tolerable bounds of concerted activity. As the Supreme Court has explained, "[t]he fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7." *N.L.R.B. v. City Disposal Systems Inc.*, 465 U.S. 822, 838 (1984). Here, the NEMSA collective bargaining agreement contained a specific no strike/work action clause. Section 17.01 of the collective bargaining agreement entitled "No Strike/Work Action" provided in relevant part:

...during the term of this Agreement, neither the Union nor its agents or any of its members will collectively, concertedly, or in any manner whatsoever, engage in, incite or participate in any picketing, strike, sit-down, stay-in, slowdown, boycott, work stoppage...at any Employer location within the bargaining unit covered by this Agreement...Employees who violate this Article shall be discharged from employment...

(GC Exh. 4 at 45.) Cummings' actions violated this provision and Respondent properly terminated him for the conduct. See City Disposal Systems, 465 U.S. at 837. See also, Stop & Shop, Inc., 161 NLRB 75, aff'd. 377 F.2d 59 (C.A. 1) (union steward's conduct not protected where he instructed employees not to use a piece of equipment on the ground that it was not safe even though a safety engineer had declared the equipment safe and adequate); Manville Forest Products, 269 NLRB 390 (March 27, 1984) (union steward's conduct not protected where steward advised other employees asked to assist in a workplace investigation not to give statements in connection with the investigation).

Cummings was fired because he incited a work stoppage in violation of the NEMSA CBA. Subsequent to Cummings' threatened work stoppage and repeated refusal to deny doing the same, detailed above, Respondent discovered that nearly fifty percent of its employees completed and turned in "Vehicle Inspection" sheets. This finding confirmed for Respondent that Cummings made good on his threat. The documents and testimony clearly portray this chain of events and the reasonable, logical conclusion reached by Respondent that Cummings had incited a work action in violation of the NEMSA CBA.

Based upon the record evidence, Cummings did not engage in protected union activity. Accordingly, the CGC did not meet her burden under *Wright Line*, 251 NLRB at 1083. Respondent did not unlawfully discharge Cummings. Respondent believed that he incited a work stoppage against it and, when asked by Respondent whether he did incite a work stoppage, Cummings repeatedly refused to deny the allegations. Within

weeks of Cummings' threat, some fifty percent of Respondent's emergency personnel failed to complete and turn in their "Vehicle Inspection" checklist. The ALJ's finding that Respondent terminated Cummings in June of 2011 in violation of Section 8(a)(1) and (3) is contrary to the record evidence. Accordingly, the ALJ's decision should be reversed.

C. The ALJ Erroneously Concluded That Respondent Violated Section 8(a)(1) And (5) Of The Act By Unilaterally Changing Its Policies And Issuing The Relevant Disciplines.

Respondent appropriately enforced a legitimate and existing workplace rule. The ALJ's conclusion to the contrary is not supported by the record and therefore should be reversed by the Board.

The record in replete with evidence demonstrating that Respondent and NEMSA agreed to SOPs in 2009, shortly after ratifying the NEMSA CBA. These SOPs include a requirement that emergency personnel to complete a vehicle inspection form and check vehicle oil levels. (R. Exh. 27.) While it is true that Respondent chose to not enforce this rule until April 2011, contrary to the ALJ's conclusion, the NEMSA CBA did not obligate Respondent to bargain with NEMSA over a decision to begin enforcing the rule.

Within 90 days of the ratification of the NEMSA CBA, Respondent provided NEMSA with its existing SOPs as required by the NEMSA CBA. (Tr. p. 1027; GC Exh. 4; R Exh. 2.) Thereafter, in the fall of 2009 and into the spring of 2010, the Union and Respondent met and conferred on several occasions to discuss the Standard Operating Procedures. (Tr. p. 1027.) In February 2010, Piendel emailed the Union a final draft of the Standard Operating Procedures and sought any further changes. (Tr. p. 1029, 1035; R Exh. 27.) Respondent received a verbal authorization that no further changes

were necessary and Respondent distributed the final version of the Standard Operating Procedures in March 2010 to employees. (Tr. p. 1057-1059; R Exh. 27.)

Standard Operating Procedure 2.22, entitled "Start of Shift Procedures", requires all relevant employees to:

Report to the vehicle and complete a "Vehicle Inspection" sheet and include it in the daily paperwork. Ensure that the vehicle is ready to respond by checking the oil level and starting the vehicle. Any vehicle failures shall be promptly reported to the Operations Supervisor.

(R Exh. 27 at p. 15.)

Not only was the "Vehicle Inspection" sheet requirement properly adopted, but Respondent provided sufficient notice to emergency personnel that it would be enforcing the requirement. In January 2011, Sawicki spoke with Respondent FOSs and explained the importance of ensuring that emergency personnel were checking vehicle oil levels at the beginning of their shift, particularly in light of the new gasoline powered vehicles. Additionally, Drouin emailed a draft of the revised "Vehicle Inspection" sheet to the FTOs, who are bargaining unit members, for their feedback. (R Exh. 10.) No FTO provided any feedback. (Tr. p. 815-818.) Drouin thereafter emailed the final version to the FTOs on April 6, 2011 and instructed them to begin using the form immediately. (R Exh. 13; GC Exh. 6.) Drouin also posted a notice on April 8, 2011 in the employee break room and on the company's internal Ninth Brain system alerting employees to the revised form and the need to complete the form and turn it in before the end of every shift. (GC Exh. 15.) Finally, Drouin emailed the April 8th memo to NEMSA's Respondent representative Sparks. (R Exh. 14.) To suggest that emergency personnel did not have notice of Respondent's decision to enforce the "Vehicle

Inspection" sheets simply flies in the face of the record evidence the ALJ's conclusions to the contrary should be reversed.

. The ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act in enforcing the "Vehicle Inspection" requirement is contrary to the record evidence. Accordingly, the ALJ's decision should be reversed.

D. The ALJ Erroneously Concluded That The Board, As Currently Constituted, Has Authority To Act In This Matter.

The NLRB Casehandling Manual Sec. 102.31 provides in part that a petition to revoke that is filed prior to a hearing be referred "to the administrative law judge or the Board for ruling." That means that in a case such as this, where an administrative law judge has not yet been assigned, the petition to revoke must be referred to the Board for decision. Here, however, the Board lacks the authority to rule on the petition to revoke. This is because the Board may not act with only two members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Although in early January, President Obama announced the appointment of three new members to the Board, those appointments run afoul of the Constitution and must therefore be disregarded. The Appointments Clause of the Constitution, Article II, Section 2, Clause 2, empowers the President to nominate members of the Board "by and with the Advice and Consent of the Senate." Although the following clause, Article II, Section 2, Clause 3, permits the President to make "recess appointments" in certain situations, that clause does not permit the recent purported appointments. This is because the provision for recess appointments applies only in the case of "legitimate" Senate recesses. *See, Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004). The January appointments were not made during a legitimate Senate recess. Rather, at the

time of the appointments the Senate was following a longstanding practice of convening pro forma sessions. This has the effect of interrupting any "recess" which would authorize the appointments in question.

E. The Portion Of The ALJ's Recommended Remedy Requiring Reinstatement Ignores The Record Evidence Of Cummings Violence Towards Respondent.

As part of the remedy, the ALJ recommend that Respondent reinstatement Cummings. (ALJD at 14.) The ALJ's recommendation of reinstatement, however, ignores the evidence of Cummings' violent tendencies towards Respondent and its management. Subsequent to his termination, Cummings posted a comment on a facebook page of a Respondent emergency personnel stating,

Until AMR gets rid of the management team up to and including Zagombi nothing will change. Only crews and patients will suffer.

(GC Exh. 49.) Next to this statement was a picture of Cummings holding and aiming a semi-automatic weapon. (R Exh. 7.) Attached hereto is the decision in *Teamsters Local 379 and Brockway-Smith Company*, American Arbitration Association Case No. 11 300 02501 01 dated May 10, 2002. This case involved an employee who made a threat to "stop by the Armory" on his way to work. Arbitrator Joan Dolan reviewed the case law cited by the union attorney in that case and considered the defenses which had been put forth in those cases to justify the threats made by employees. Arbitrator Dolan noted the following:

Finally, many of the Union's cases are from another time and another culture. None of the threat cases in which penalties were reduced from discharges to suspensions is more recent than 1997. Given the way violence and threats of violence cases have been approached by arbitrators in recent years, it seems highly doubtful that some of these cases would come out the same way today. It used to be a common practice for people to have a few beers at lunch time and

return to work, for marijuana usage to be ignored, and for gender- and racebased harassment to be tolerated.

There has been a sea change in law, company policies and attitude towards these previously widespread activities.

The same change has occurred in recent years with regard to violence, words that can reasonably be construed as constituting threats of violence, and threatening statements made by employees with reckless disregard for their effects on fellow workers.

Teamsters Local 379, American Arbitration Association (2002) (No. 11 300 02501 01 at *24, Joan Dolan). Given Cumming's facebook post and picture, the ALJ should not have recommended reinstatement.

VI. CONCLUSION

The Company categorically denies any unlawful conduct and believes that when the Board reevaluates the ALJ's erroneous findings and conclusions of law, the conclusion will be that the Company did not commit unfair labor practices. Therefore, the Company respectfully requests that the consolidated complaints be dismissed in their entirety.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

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Hartford, Connecticut January 18, 2013

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 34

AMERICAN MEDICAL DECRONGE

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

and : Case 34-CA-013051

ADAM CUMMINGS, AN INDIVIDUAL

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

: Case 34-CA-065800

and :

SHANNON SMITH, AN INDIVIDUAL : JANUARY 18, 2013

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE THE ADMINISTRATIVE LAW JUDGE'S DECISION has been served by email this 18th day of January, 2013, to the following:

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